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In the Supreme Court of the United States

October Term, 1931.

No. 485

CHAMPLIN REFINING COMPANY, *Appellant,*

vs.

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA AND PAUL WALKER, E. R. HUGHES, AND C. C. CHILDERS, ETC., *ET AL., Appellees,*

No. 486

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA AND PAUL WALKER, E. R. HUGHES, AND C. C. CHILDERS, ETC., *ET AL., Appellants,*

vs.

CHAMPLIN REFINING COMPANY, *Appellee.*

BRIEF OF PHILIP KATES, AMICUS CURIAE

(36,299-36,300)

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IN THE SUPREME COURT OF THE UNITED STATES.

***October Term, 1931.* Nos. 485, 486.**

Champlin Refining Company, *Appellant,*

vs.

Corporation Commission of the State of Oklahoma, *et al.*

BRIEF OF PHILIP KATES, *AMICUS CURIAE.*

Statement of the Case.

The Champlin Refining Company (appellant) by orders of the Oklahoma Corporation Commission (appellee) (R. Vol. 2, pp. 85-221) made under an Oklahoma statute (Okla. Sess. Laws 1915, p. 28), was prevented from taking from its own wells such oil as it deemed necessary for its own use, and sued to enjoin the enforcement of the orders (R., Vol. 1, p. 6). It was refused relief in a three-judge District Court and is here on appeal, alleging that the law and the orders are in contravention of the Federal Constitution; being a regulation by Oklahoma of commerce in oil among the states. (Assignments of Error 7 and 9; R., Vol. 1, p. 379). This brief is directed to that point alone.

The law (Okla. Sess. Laws 1915, p. 28) and these orders (appendix to this brief; R., Vol. 2, pp. 85-221) on their face show that the Oklahoma scheme of control of oil production to prevent waste is based upon the legal principle that the "waste" against which the law is directed exists when the State Commission decides that, when added to the oil of other states, uncontrolled production in Oklahoma will glut the market. The factor which determines the re-

straint to be imposed on appellant is the national supply (Appendix). That was eliminated from the law by the Supreme Court of Oklahoma (*Julian* v. *Capshaw*, 145 Okl. 237), but remains in the orders as the basic norm of waste; the canon of restraint (R., Vol. 2, pp. 85 to 221).

The opinion of the court below is in the record, Vol. 1, page 218, and 51 Fed. (2d) 823.

ARGUMENT

The trial court put aside the interstate commerce question saying (R., Vol. 1, p. 228): "The principle is too well settled to require citation, that the congressional power of regulation attaches only when interstate transportation has begun."

The most effective regulation is a limitation on the amount of a commodity which may be allowed to move. And such regulation must necessarily precede a movement. In the second appeal in the *Coronado* case (268 U. S. 295), this court, through Chief Justice TAFT, held prevention by a labor union of mining coal in Sebastian County, Arkansas, against the Act of Congress. The movement of unmined coal could not have begun. The test in that case was whether the prevention would materially affect the national supply. In the first appeal the record showed a prevention of 5000 tons a week (259 U. S. 344); the second appeal 5000 tons a day. This latter, it was held, was a material amount (approaching 1% of the national supply) which

might move in commerce among, and so enter the markets of, the states.*

The Oklahoma scheme of control, as appears from the terms of the statute and upon the face of the orders, is based upon and varies with the total production of petroleum in all states. The State Commission determines the national supply and fixes the amount which Oklahoma shall contribute to what it finds the total demand (J. E. 1856, R., Vol. 2, p. 231; J. E. 1864, p. 233). The State Commission has found that 65% to 75% of Oklahoma oil enters interstate markets (R., Vol. 2, p. 135). In 1930 Oklahoma produced 24% of the nation's oil. WILBUR, *Conservation*, Govt. Ptg. Office, 1931, pp. 85, 86.

Here is a question of the power of a state to regulate national markets. Who controls the supplies entering the market controls the market. Section 8 of article 1 of the Federal Constitution was adopted to prevent in any event one state, and section 10 to prevent any group—except under congressional permit—from exerting this power.

Section 10 of article 1 recognizes the right of states to form compacts under the authority of Congress; and the court will judicially know that at this time a compact (recommended by the Oil Conservation Board in its first re-

*In 1914, the year in which the interference involved in the *Coronado* case occurred, the production of bituminous coal was proceeding at the rate of about 1,035,000 gross tons per day or 8,145,000 tons per week. The potential capacity of the mines involved was, Chief Justice TAFT said, "substantially in excess of 5,000 tons per day." We are justified in assuming that he did not have in mind more than ten thousand tons per day.

Comparing the national production with the highest estimate of the potential of the mines involved, 70,000 tons per week, it appears that an interference with a potential of less than one per cent of the national supply was held to be an interference with interstate commerce.

—Okla. State Bar Journal, Vol. 2, p. 66, June, 1931.

port in 1927) is being drawn by the oil producing states to proportion allowable production among them; the only effective method of stabilizing this industry. This will, under the Constitution, be submitted for congressional approval. A compact was signed between Oklahoma, Kansas and Texas September 18, 1931 (Yale Law Rev., Nov., 1931, p. 66, note 123), but not sent to Congress.

A new compact was drafted by the oil states advisory committee on March 1, 1932, but not made public (Ass. Press dispatch, that date).

The right of any state to regulate the production of its natural resources in the interest of conservation, or public health and safety is admitted, except to this extent: no state may, under the guise of conservation, prevent or directly and materially limit, the exportation of its resources to other states *(West* v. *Kansas Natural Gas Co.*, 221 U. S. 229).

The state regulation here is founded upon, and changes with, the national supply and the demands of the national market; and the restraint of appellant in taking oil from his wells contracts as the national supply rises (Par. c., d., R., Vol. 2, pp. 125, 126). The state in imposing this restraint is not acting within the orbit of its constitution; it has entered that of the Federal Constitution. It determines directly, necessarily and materially the amount of a basic commodity which it will permit to enter commerce among, and to be offered in the markets of, the several states.

This court has, in a series of decisions, beginning with the *Ohio Oil Company* case (177 U. S. 209) upheld various progressive plans for state control of oil and gas produc-

tion. Recently a California statute, which may have the effect of materially limiting the supply from the great fields of that state, has been upheld. (*Bandini* v. *Superior Court*, 284 U. S. 8).

But in all those cases any limitation of the amount of the commodity entering commerce among the states was an accidental effect of laws against waste. The laws upheld may or may not affect the national markets.

In Oklahoma "waste" exists, not because there is improper operation of the wells, but because there is in the judgment of the State Commission an excessive supply. The national supply of crude petroleum—whether it is normal or excessive—determines the existence of "waste." To use the classification of Aristotle, that is the material cause, the thing which calls the law into operation. The limitation of that supply is the final cause—the object to be accomplished.

The court may judicially notice that in 1931, as the supply from East Texas rose, the restraint on Oklahoma producers progressively tightened; and that in the summer of 1931, by martial law, the Oklahoma wells were shut in to raise the price of Oklahoma oil to $1.00 per barrel. (Yale Law Rev., Nov., 1931, p. 56.)

The orders of the Oklahoma Commission are the machinery for the enforcement of the law; and however much the fact is obscured in a cloud of words about conservation, waste, ratable taking—when the vital parts of orders are read (Appendix)—their purpose and effect are seen to be a necessary, a direct, a substantial control of the national commerce in crude petroleum.

The opinion of Chief Justice TAFT in the second *Coronado Coal* case (268 U. S. 295), should be controlling on this appeal. In that case the stoppage of less than 1% of the daily national production of bituminous coal was held to be an interference by a labor union with interstate commerce. In this case the limitation is of a far greater percentage of petroleum, about 15% of the national supply (65% to 75% of 24%). The coal was unmined; and so, as much as unproduced oil, was not itself the subject of commerce; and the mines were all in one county in Arkansas, as here the oil wells are all in Oklahoma. There was, in the *Coronado* case, no burden on, but an interference with, commerce among the states.

The interference disclosed in this appeal is more substantial than that in the second *Coronado* case. It is more direct than was the law of Maryland imposing a tax on dealers in imported articles, which this court struck down over a hundred years ago in *Brown* v. *Maryland* (12 Wheat. 419).

ROGER TANEY, in that case, contended for the state's power. The law was wise he said. It was necessary. But Chief Justice MARSHALL answered, the Constitution has not confided that subject to the good sense of the state.

It is not without significance that the execution of these laws has been entrusted, by the States of Oklahoma and Texas, to their military forces. The disturbance which has been caused is no longer of academic interest or private concern. It shakes the frame of constitutional government. The Supreme Court of Oklahoma has very recently said (Feb. 2, 1932), speaking through Mr. Justice FLETCHER

RILEY: "The people of Oklahoma have * * * indicated their ineptitude for the spirit of martial law." *(In re Initiated Petitions,* 61 Okla. App. Ct. Rep. 216, at p. 220.)

This case comes up upon a record which, however confused it may be in details, shows, *in limine* an act of national concern in purpose and effect.

Since the enforcement of the law against appellant is necessarily predicated upon orders based on the varying levels of the national supply of petroleum, the mere inspection of the pages of the record which disclose that fact should conclude the hearing. The condition upon which the law is evoked is national. The California statute recently before this court shows that it is not necessary to go outside the basic law, nor to put the oil fields under military rule to protect the oil supplies of the state from waste. But a scheme, as shown in this record, to restrain production in one state because of a national oversupply, is contrary to the Constitution.

The purpose of article 8 of section 1 has been said by this court *(Pennsylvania* v. *West Virginia,* 262 U. S. 553), to be

> "to protect commercial intercourse from invidious restraints, to prevent interference through conflicting state laws, and to insure uniform regulation. It means that in the matter of interstate regulation we are a single nation—one and the same people."

An inspection of the law and the orders in this appeal shows that they are directed not primarily against waste, but against what the state considers an oversupply to the nation. If Oklahoma has the power to limit this substan-

tially, as here, then, as Mr. Justice McKenna said in *West* v. *Kansas Nat. Gas Co., supra:*

> "Pennsylvania may keep its coal, the northwest its timber, the mining states their minerals; and why may not the products of the field be brought within the principle? * * * If one state has it (the power) all states have it; embargo may be retaliated by embargo, and commerce halted at state lines."

In Harvard Law Review, February, 1932 (p. 564, n. 48), it is suggested that this case may be distinguished from the *Kansas Natural Gas* case, *supra,* as this legislation "deals with commodities not yet owned because not yet reduced to possession."

In the *Kansas Natural* case the gas affected by the statute had not been taken from the ground: the producer had penetrated the gas bearing sand, as here (R., Vol. 2, p. 180, IV) appellant as penetrated the oil bearing sand. Possession of the gas in that case was the same as appellant's possession of oil in this.

Respectfully,

Philip Kates,
Amicus Curiae.

Tulsa, Oklahoma.

APPENDIX.

The orders of the Commission creating the condition complained of in this appeal are found in the record, Vol. 2, pages 85 to 221:

1. In order 5189 (2d par. sub-div. c., R., Vol. 2, p. 86) the base order on which all others stand, the Commission finds the potential production of petroleum in the United States was at that time (June 30, 1930) 4,730,000 barrels per day. The demand for domestic use and export was 2,840,000 barrels per day. The potential production in Oklahoma was 1,362,000 barrels per day (p. 88). That the demand from Oklahoma was 650,000 barrels per day. The production in Oklahoma was restricted to the latter amount allocated among the pools as shown in the table (R., Vol. 2, pp. 89, 90).

2. In order 5369 (R., p. 124) the Commission finds (2nd par., sub-div. c., R., Vol. 2, p. 125) that the potential production of the United States was at that time (October 28th, 1930) 10,000,000 barrels per day; imports 300,000 barrels per day; national demand for domestic use and export 2,800,000 barrels per day; that (R., p. 127, par. f) the potential production from Oklahoma during October, 1930, will be 3,638,470 barrels per day; during November 4,142,872 barrels per day; in December 4,294,444 barrels per day; that the demand from Oklahoma will be 550,000 barrels per day in October; 545,000 barrels in November; 535,000 barrels in December, daily. By reason of these facts the production in Oklahoma is limited to the market demand and allocated among the pools as shown in the table (R., pp. 128-129). The Commission limited the production in Oklahoma to those figures (2d par., R., p. 139).